IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

BORDEN RANCH PARTNERSHIP and ANGELO K. TSAKOPOULOS, Plaintiffs, v. UNITED STATES ARMY CORPS, OF ENGINEERS and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY Defendants. And Related Counterclaim.	CIV. S-97-0858 GEB JFM FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs Borden Ranch Partnership ("the Partnership") and Angelo K. Tsakopoulos ("Tsakopoulos") commenced this action May 7, 1997, alleging statutory and constitutional claims and seeking declaratory and injunctive relief. The United States Environmental Protection Agency ("the EPA") counterclaimed for alleged violations of the Clean Water Act, 33 U.S.C. § 1311. Summary adjudication in favor of Defendants on Plaintiffs' claims was granted by an Order entered June 9 and amended August 3, 1998 ("the August 3, 1998, Order"). The

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counterclaim was tried to the bench from August 24 to September 16, 1999. The Court's findings of fact and conclusions of law are as follows.

I.

FINDINGS OF FACT

Findings of fact regarding background information are contained in subsection A., *infra*. Subsection B. describes specific impacts upon relevant hydrological features.

A.

Background

On June 30, 1993, Tsakopoulos acting as general partner of the Partnership purchased 8,348 acres of land situated ten miles east of Galt, California for approximately $8.3 million. Exhs. 4, 7, 8.[1] This noncontiguous property ("Borden Ranch") straddles Dry Creek, which forms the border between Sacramento County (to the North) and San Joaquin County (to the South). Approximately seventy percent of the property is north of Dry Creek. Exh. 67. Borden Ranch previously had been used primarily as rangeland for grazing cattle and producing wheat, hay, alfalfa, tomatoes, sugar beets, beans, and corn. Tsakopoulos intended to convert the majority of the land for use as vineyards and orchards to increase the value of the property.

Besides Dry Creek, Borden Ranch encompasses Goose Creek -- which runs east to west through the San Joaquin County portion of Borden Ranch -- and a significant number of hydrological features known as swales, vernal pools, and intermittent drainages. A swale is a sloped wetland containing aquatic plant life which allows passage of

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[1] The property is titled in Tsakopoulos himself.

small animal life, slows peak water flows, filters water, and minimizes erosion and/or sedimentation. A vernal pool is a low point in the landscape underlain with a dense soil layer and wherein rainwater collects. Generally, it is inundated part of the year and is dry during the summer, and may or may not be connected with other hydrological features. Vernal pools also commonly serve as habitat for exotic species of wildlife that have adapted to these features' uncommon characteristics. Some of these species have been deemed threatened or endangered under the Endangered Species Act. In the United States, vernal pools are found chiefly within California and are prevalent in the Central Valley. Intermittent drainages are basically streams or water courses with a defined bed and bank that generally transport water during and after rains. The intermittent streams on the San Joaquin County portion of Borden Ranch are tributaries of Goose Creek and Dry Creek, which are tributaries to the Cosumnes and Mokelumne Rivers.

Most of Borden Ranch is underlain with a dense layer of soil, called a "restrictive layer," or "clay pan," which prevents surface water from reaching the depths required to be reached to successfully utilize the property for vineyards and orchards, which have deeper root systems than crops previously grown on the property. Consequently, Tsakopoulos planned to plow much of the property using plows that dig into the ground to a depth of five to seven feet. This is called "deep ripping" and is accomplished by dragging long metal "shanks" through the ground. Deep ripping alters the movement of surface and subsurface water in the ripped areas by moving earth, rock, sand, and biological matter both horizontally and vertically. This allows water to percolate to greater depths and limits or

destroys the ability of jurisdictional waters to retain water. Borden Ranch also was plowed occasionally to a depth of 12 to 16 inches using a method called "discing." The purpose of these plowing activities was, in part, to disturb the restrictive layer of the soil so that deeper layers of soil could accept and retain moisture.

Tsakopoulos was aware of the presence of swales, drainages, and vernal pools on the property at the time he purchased Borden Ranch. Exh. 2. He also was aware that most or all of these features constituted "waters of the United States" within the meaning and coverage of the Clean Water Act ("the Act"); and, that any discharge of fill material into a water of the United States was prohibited by the Act unless a permit was obtained from the United States Army Corps of Engineers ("the Corps"). Tsakopoulos has also been a real estate developer since the early 1960s and had dealt with the Corps and applied to the Corps for permits under the Act, on several occasions since the mid-1980s in connection with activities associated with various projects he was undertaking which implicated the Act and the Corps's jurisdiction thereunder. He had previously learned that there exists an exemption from the Corps's permit requirement for certain farming activities, including plowing, and he questioned whether this exemption applied to his contemplated deep ripping activity.

Sometime in mid-1993, Tsakopoulos contacted Thomas Coe, an officer at the Sacramento District of the Corps, and asked him whether the land preparation activities he anticipated undertaking on Borden Ranch would require a permit. Coe told him that a permit could be required if those activities would affect wetlands. Shortly thereafter, Tsakopoulos met with Coe and other Corps officials to discuss whether the planned plowing would be exempt from coverage

under the Act as agricultural activity. The Corps maintained that a permit would be required. In late October of 1993, Tsakopoulos notified the Corps that he planned to cause plowing of a 444-acre portion of Borden Ranch on the Sacramento side of Dry Creek, known as the Castlehill parcel, and that this plowing would impact approximately seven acres of wetlands. Tsakopoulos hoped this notification would enable him to obtain authorization under a "nationwide permit," by which the Corps has allowed otherwise-prohibited discharges of dredge or fill material into a certain maximum area of jurisdictional waters conditioned upon, *inter alia*, prior notice being given to the Corps. See 33 C.F.R. Part 330, App. A (B)(26) (1993). When Corps representative Karen Shaffer visited the property in October of 1993 to verify certain wetland delineation maps provided by Tsakopoulos, she noted that Tsakopoulos's crews had already commenced deep ripping the property and were driving their plows over wetlands with the metal shanks raised at least partially out of the ground. She perceived that this activity disturbed the soil to a depth of approximately six inches. Exh. 9. Consequently, she told Tsakopoulos's representative then that undertaking such activity on the property's wetlands without a permit would violate the Clean Water Act. Id. An attorney for Tsakopoulos thereafter wrote to the Corps, indicating that Tsakopoulos had a sale of that parcel pending and requesting immediate advice regarding whether the planned ripping and discing activities on the Castlehill parcel could proceed. Exh. 10. The Corps responded via a letter in early November 1993 wherein the Corps reiterated that Tsakopoulos's indicated activities could cause "discharge of dredged or fill material in waters of the United States" and that this would be allowed to occur into up to one

acre of wetlands on the parcel under the nationwide permit, but a permit would have to be obtained "under Section 404 of the Clean Water Act" if more than one acre was affected. Exh. 11.

When the Corps concluded that the impacts of the proposed plowing on the Castlehill parcel would not be "minimal," it notified Tsakopoulos in late November of 1993 that he was not eligible for the nationwide permit. Exh. 12. The parties undertook further negotiations and, in March of 1994, the Corps agreed to allow the Castlehill plowing to take place in exchange for certain mitigation activities being undertaken by Tsakopoulos. Specifically, Tsakopoulos was required to construct 4.77 acres of seasonal wetlands and to enhance and preserve certain other wetlands on the property. An after-the-fact permit for the Castlehill project issued March 15, 1994. Tsakopoulos eventually sold the Castlehill parcel in September of 1994 for approximately $1.66 million. Exh. 67.

In May 1994, Tsakopoulos evinced a change of heart regarding Borden Ranch; he wrote to the Corps stating that he had abandoned his plan to convert the majority of Borden Ranch for use as vineyards due to the expense attended to the permitting process. Exh. 547. He said he would focus on continuing use of the property for ranching purposes. By missive dated July 6, 1994, the Corps reiterated its position that deep ripping would not be exempt from Clean Water Act regulation. Exh. 24. In late September of 1994, Tsakopoulos and the Corps met with representatives of the EPA to discuss whether certain range management activities would be exempt from regulation under the Clean Water Act. At this meeting, Tsakopoulos indicated that he still intended to deep rip the "uplands" -- areas that are not federal wetlands -- and the Corps indicated that this would not require a

permit. Tsakopoulos further sought to drive deep ripping equipment over wetlands with the shanks raised to their uppermost position in order to avoid plowing those wetlands. Tsakopoulos's consultant, Andrew Johas, represented that this would result in no continuous disturbance, but only in occasional "tagging" of the soil as bumps in the landscape met the raised shank. The Corps agreed to allow this driving over the swales, but forbade driving over the vernal pools.[7]

In April of 1995, the Corps discovered that deep ripping of wetlands had occurred on another portion of Borden Ranch called the Prudential parcel. A Cease-and-Desist letter issued April 12, 1995, that directed Tsakopoulos to stop deep ripping activities in waters of the United States. Exh. 30. At an April 18, 1995 meeting with representatives from the Corps, Tsakopoulos contended his understanding after the September 1994 meeting had been that all portions of Borden Ranch could be deep ripped except the vernal pools. Exh. 558. After further discussions that month, Tsakopoulos submitted an application in May of 1995 for a permit covering a 1,268-acre area in Sacramento County. Exh. 36. In conjunction with this application, Tsakopoulos agreed to set aside 1,600 acres of Borden Ranch north of Dry Creek as a wetland preserve. Id. The application was handled on an "emergency" basis; a permit was sent to Tsakopoulos for his signature at the end of May 1995. However, Tsakopoulos objected to

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[7] Tsakopoulos testified at the bench trial that the agency officials had stated at this meeting that the vernal pools could legally be disced without a permit. That testimony was not veracious and is belied by the consistent position federal officials expressed to Tsakopoulos on this matter. As to the directives Tsakopoulos was given about deep ripping activity in jurisdictional wetlands, the no-ripping directive was clear and unwavering. Although Tsakopoulos attempted to show that there was confusion about this amongst federal agencies, the directive he received from the Corps was categorical and pellucid.

certain details in the permit, drew a line to exclude the mitigation provision, and then signed and returned the permit to the Corps. Exhs. 38, 40. The Corps responded by informing him in a June 30, 1995 letter that his alteration voided the permit and he was deemed to be proceeding without one. Exh. 40. In mid-July, Tsakopoulos submitted another permit application to construct and operate a separate 816 acres of vineyards on the Sacramento County side. Exh. 572.

Deep ripping activities continued on the Sacramento County side without a permit and commenced on the San Joaquin County side of Borden Ranch in October of 1995. In November of 1995, the Corps learned that deep ripping on wetlands had again occurred, this time in two areas on the Sacramento County side, one of which had been part of the wetlands preserve that Tsakopoulos had indicated would be set aside as mitigation in his May 1995 permit application. Exhs. 580, 582. A second Cease-and-Desist letter issued November 22, 1995. Exh. 50.

Deep ripping on the San Joaquin County side proceeded initially in parcels numbered 6 and 10. Exh. 47. It is unclear to what extent flagging of jurisdictional waters had taken place there. At a late November 1995 meeting attended by representatives of Tsakopoulos and Sugnet and Associates ("Sugnet"), the company hired by Tsakopoulos to assist in the permitting process, the flagging and marking of property on the San Joaquin County side of Borden Ranch was discussed. Deep ripping also occurred in parcels 8 and 9 on the San Joaquin County side, where only vernal pools had been flagged to alert deep ripper equipment operators to avoid them. The senior project manager from Sugnet told Tsakopoulos that flagging was done *only* around vernal pools pursuant to a direction from Chris Vrame, one of

Tsakopoulos's consultants. Vrame, who also was present, told Tsakopoulos that he had received such direction in a memorandum from Tsakopoulos's company, AKT Development Corporation. Tsakopoulos became very upset, and Vrame directed that flagging be placed around all swales and drainages on the San Joaquin side and that aerial photographs be taken of the damaged areas.

On December 4, 1995, Coe and Tsakopoulos visited a portion of the Sacramento County side of Borden Ranch, delineated as parcel 15, and observed that some of the swales located thereon had been deep ripped and then disced, resulting in their complete obliteration, and that only some of the vernal pools had been flagged by the plowing crews. Those not flagged had been filled in with soil. Tsakopoulos indicated that he had told the plow operators to completely avoid the vernal pools. In late December of 1995, Tsakopoulos executed a contract to sell parcel 10 on the San Joaquin County side, encompassing 197 acres, to a California partnership called Watts Vineyard for $574,000. Exh. 60. By the end of 1995, Tsakopoulos had sold two other parcels totaling approximately 1,266 acres for slightly more than $5.45 million, in addition to the Castlehill and Watts Vineyard sales. Exh. 67.

In early January of 1996, Sugnet prepared a summary of the amount of acres of "basins" and swales that had been deep ripped. The "basins" therein referred to vernal pools. According to Sugnet's summary, 0.52 acres of swales had been deep ripped on the San Joaquin County side of the property in parcels 6 and 10. Exh. 61. This summary was transmitted to Vrame.

In February of 1996, the EPA entered into discussions with Tsakopoulos aimed at the execution of an Administrative Order on

Consent ("AOC") which would address all Clean Water Act violations on the Sacramento County side of Borden Ranch. In March of 1996 Tsakopoulos submitted a map delineating wetlands features on the San Joaquin County side. Exh. 63. An officer from the Corps, Thomas Cavanaugh, visited Borden Ranch twice in early April 1996 to verify this delineation map. During his visits, he noted that several swales on parcels 6 and 10 had been deep ripped; furrows caused by plowing in those areas were two-to-three feet deep and crossed over the wetlands. However, vernal pools on parcel 10 apparently had been avoided by the plows. After field verification was completed, the wetlands delineation map was revised. The Sugnet wetlands delineation map identified a total of 66.29 acres of "jurisdictional waters" of the United States on the San Joaquin County side of Borden Ranch. Exh. 65.

Tsakopoulos entered into a contract in March of 1996 to sell a 400-acre portion on the Sacramento County side to a California corporation, Farmland Management Services, for $1.4 million. Exh. 588. By April 30, 1996 he had sold or had sales pending for 4,036 acres of Borden Ranch. Exh. 67. The total sales price for this property equaled approximately $16.2 million. Id.

On May 3, 1996, a final AOC was executed which resolved the alleged Clean Water Act violations[3] on a 2,100-acre portion of Borden Ranch north of Dry Creek, whereon the EPA had alleged that 49.1 acres of waters of the United States had been disturbed. Exh. 66. It was agreed that a 1,368-acre preservation would be set aside as mitigation for these violations and that Tsakopoulos would pay $44,700 to

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[3] Tsakopoulos did not admit therein that any violation had occurred. Exh. 66 at 9.

maintain the preserve. Id. The AOC also memorialized Tsakopoulos's contention that this preserved land "contain[ed] environmental and wildlife functions in excess of that which is needed to compensate for the alleged impacts to functions of waters of the United States resulting from" Tsakopoulos's plowing activities. Exh. 66. It was agreed that the EPA and/or Tsakopoulos would undertake further studies regarding the possibility that he had undertaken excess mitigation and would, if any dispute thereafter remained, submit the dispute for resolution by the EPA's Regional Administrator and the Corps's District Engineer. Id. at 13-14. Finally, Tsakopoulos agreed to cease further discharges into waters of the United States "except in compliance with an appropriate authorization under the" Clean Water Act. Id. at 11. A permit for the 2,100-acre portion on the Sacramento County side which was covered by the AOC issued May 8, 1996. Exh. 593.

In late June of 1996, Tsakopoulos's consultants learned that agents of McCarty Co., which had purchased an 800-acre portion of Borden Ranch in 1995, had illegally plowed and filled in almost half of the wetlands on that portion. Exh. 600. Tsakopoulos directed the consultants to monitor McCarty Co.'s activities on the parcel. Id.

By letter dated July 8, 1996, the Corps informed Tsakopoulos's project manager that the wetlands delineation map submitted in March and revised in April had been "reviewed and verified." Exh. 70. That letter also stated, in part:

> Our jurisdiction in this area is under Section 404 of the Clean Water Act. A Department of the Army permit is required prior to discharging dredged or fill materials into waters of the United States. Discharge of dredged material includes but is not limited to any addition, including redeposit, of dredged material, including excavated material, into the waters of the United States

> which is incidental to any activity including mechanized land clearing, ditching, channelization, or other excavation. Accordingly, a permit will be required **PRIOR TO ENGAGING IN ANY EARTHMOVING ACTIVITY** in any of the 66.29 acres of waters, including the swales, present on [the San Joaquin County side of] Borden Ranch . . ..
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> In addition, two areas on the San Joaquin County portion were deep ripped without Department of the Army authorization. These violations were not resolved with the Administrative Order pertaining to other portions of the ranch. Therefore, a permit application, along with a mitigation plan, should be submitted as soon as possible if your client wishes to retain these fills.

Id. (emphasis in original).

On September 5, 1996, Tsakopoulos and several representatives from the Corps, the EPA, and the offices of certain United States legislators visited Borden Ranch to inspect vernal pool sites. The Corps's representatives reiterated that wetlands on the property could not legally be deep-ripped without a permit and that vernal pools had to be avoided. Exh. 615. Tsakopoulos understood and agreed. In late September of 1996, Tsakopoulos met with Champ to discuss ongoing plowing activities on the San Joaquin County portion of Borden Ranch. Exh. 77. Tsakopoulos indicated that he would file a permit application by mid-October 1996. Id. Shortly thereafter, Champ wrote to Tsakopoulos and reiterated his belief that Tsakopoulos then "underst[oo]d that the discharge of fill material, including redeposit of excavated material for the purposes of installing vineyards in rangeland, requires a Section 404 permit." Champ further wrote that "any earthmoving activities that involve waters of the United States, including swales," required a permit. Id.

In November of 1996, Cavanaugh again visited the San Joaquin County portion of the property after having been told by one of

Tsakopoulos's employees that deep ripping had resumed there. He saw that parcels 6, 8, and 9 had been deep ripped and observed evidence of tracks evidently left by deep ripping equipment evincing that some of the swales on those parcels had been deep ripped. He also noted that parcel 10 -- which earlier had been sold to Watts Vineyard -- had been disced and planted with vineyards.

By the end of 1996 Tsakopoulos had not yet filed a permit application for the remaining activities on Borden Ranch. In a December 23, 1996 letter, he wrote to Champ explaining that "the delay to date in submitting the application" had been caused by the "time-consuming and costly" process of "gathering the voluminous information required for the application." Exh. 92 at 1. Tsakopoulos further mentioned instances involving his contention that the Corps had previously said he could "shallow plow through drainage swales." Tsakopoulos concluded the letter by complaining about the involved federal agencies' continued "effort to prevent ongoing agricultural activities from proceeding on Borden Ranch and stated that "the financial cost to the Partnership of this prolonged situation has been colossal." Id. at 3-4. Champ responded with a letter dated January 17, 1997, wherein he stated, *inter alia*, that "the conversion activities you have engaged in [on Borden Ranch] and wish to continue with are not covered by any existing exemptions and require Department of the Army authorization." Exh. 95. Champ concluded by indicating that expedited processing for any permit application would not be available to Tsakopoulos. "Therefore, if you wish to proceed with additional vineyard installation on Borden Ranch this Spring, you need to submit your permit application very soon." Id.

In late January 1997, Tsakopoulos submitted a permit

application for the remainder of the Borden Ranch project: the conversion of approximately 832 acres in Sacramento County and 2,418 acres in San Joaquin County. Exh. 96. It was estimated therein that 77.19 acres of waters of the United States existed in the San Joaquin portion; that only 21.79 acres of these jurisdictional waters would be affected by discing operations;[4] all vernal pools were to be avoided on the San Joaquin County side; "deep plowing will occur in upland areas"; "[w]hen passing through [waters other than vernal pools], the shank will be raised to its maximum height"; and, Tsakopoulos proposed setting aside a preserve totaling approximately 523 acres in mitigation of the proposed plowing effects; of which 51 acres would be wetlands. Id. In response to the question on the form application, "Is Any Portion of the Work Already Complete?", Tsakopoulos answered affirmatively and explained as follows:

> Upland areas of Parcel 1 in Sacramento County and Parcels 6, 8, and 9 in San Joaquin County have been deep ripped. Vernal pools and major drainages were avoided. The shank was raised as high as possible when passing through major drainages.

Id.

However, there was no mention in this application that deep ripping had occurred within parcel 10 on the San Joaquin County side of Borden Ranch. Further, the record reveals that on many occasions, the shank had not been raised as high as possible as it passed through drainages.

In a letter dated March 21, 1997, the United States Fish and Wildlife Service ("the Service") wrote to the Corps against the

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[4] A revision provided to the Corps in early February altered these numbers slightly. Of 77.16 acres estimated to constitute wetlands on the San Joaquin County portion, 20.66 acres were predicted to be directly impacted by plowing activities. Exh. 97.

January 1997 permit application, stating:

> It has come to the Service's attention that [Tsakopoulos] has recently engaged in unauthorized deep ripping on approximately 400 acres of land in the southern-most San Joaquin portions of the Borden Ranch property. In addition, the Service has been informed that a second potential [Section] 404 violation has occurred on a 200 acre parcel that lies north-west of the San Joaquin project area within the Borden Ranch boundary. This 200 acre section of land was deep ripped and subsequently sold. An undetermined amount of wetland impacts have occurred from these actions.

Exh. 100.

The Service also described the impacts upon wildlife that the proposed plowing would have, as well as the indirect and negative effect that conversion to vineyards could have on vernal pools. Id.

Coe sent Tsakopoulos a letter dated March 25, 1997, in which Coe explained that the Corps had received objections to his application from the Service, the EPA, the State of California, and other concerned organizations and citizens. Exh. 101. Copies of those letters of objection were provided with Coe's letter. Coe also indicated that the Corps's decision on the application would be delayed until April 23, 1997, in order to allow Tsakopoulos the opportunity to rebut these objections or propose mitigation measures appropriate to resolve them. Id. Coe added:

> In addition it is apparent that, once again, land preparation activities have been ongoing without Department of the Army authorization. One parcel in San Joaquin County, Parcel 10, has apparently been sold and has already been planted in vineyards. The wetland swales and drainages on this parcel have been filled and the vernal pools within the vineyard have been severely degraded by the surrounding vineyard activities. In addition a large portion of Borden Ranch has been ripped and disced without Department of Army authorization. It is obvious that the ripper shank passed through many of the swales and drainages. Soil was moved into a number of these drainages by turning

> equipment and at least one vernal pool within this area was directly affected by the ripping and discing operation. It also appears that the ripping equipment is positioned and ready to resume ripping operations.
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> . . . No further soil manipulation should occur in those areas of Borden Ranch for which a permit has not been issued until a final permit decision has been made for the remainder of the property.

Id.

On April 10, 1997, EPA investigators visited Borden Ranch and observed fully-engaged deep rippers passing over jurisdictional wetlands in parcel 8. On April 14, 1997, the EPA issued an Administrative Order, signed by the Acting Director of the EPA's Water Division, Alexis Strauss, finding that Tsakopoulos had violated the Clean Water Act during plowing activities commencing in October, 1996. Exh. 103. That Order directed Tsakopoulos to provide to the EPA, within five days, written certification "under penalty of law" that activities affecting jurisdictional waters had ceased and to specify the date and time of cessation. Id. Tsakopoulos sent a reply letter to Strauss dated April 21, 1997, in which Tsakopoulos questioned the regulatory authority "of both the EPA and the Corps" over his plowing activities on Borden Ranch and said no "unauthorized activities" had been conducted "in any 'waters of the United States,' except for one minor involvement of shallow plowing in a swale -- the mistaken action of a party which purchased a parcel at Borden Ranch." Exh. 639 at 2. He declined to certify that the alleged unpermitted discharges had ceased, opining that the EPA had no power to require the certification. Id.

Shortly after Tsakopoulos received the Administrative Order from the EPA, his chief consulting firm for the Borden Ranch project,

Foothill Associates ("Foothill"),[5] visited parcels 6, 8, and 9 in order to place metal T-posts around the swales and intermittent drainages on these parcels. Sugnet had previously caused the vernal pools thereon to be so marked.[6] Foothill placed stakes 10 to 15 feet outside of what was perceived to be the limits of jurisdiction to create a buffer zone.

Between April 17 and April 25, 1997, the EPA's wetlands consultant, Dr. Lyndon C. Lee, visited Borden Ranch with some of his employees to document violations of the Clean Water Act on parcels 6, 8, 9, and 10 on the San Joaquin County side. Exh. 156. He was accompanied by an EPA representative each day; most often, that representative was Robert Leidy. While at the property, Leidy observed a deep ripping machine with its shank in the uppermost position. In this position, the cutting edge of the shank was completely out of the ground. Leidy also saw furrows that were two to three feet deep crossing through two swales and a vernal pool on parcel 9 and noted that five vernal pools on parcels 6 and 8 had been completely filled in. On April 25, 1997, Dr. Lee met with Tsakopoulos and discussed Dr. Lee's observations of deep ripping across jurisdictional wetlands. Tsakopoulos initially expressed that there had been no deep ripping on wetlands. Together they visited several jurisdictional features, including a vernal pool in parcel 9 around which five-foot-high metal stakes had been placed. The stakes had

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[5] Foothill had replaced Sugnet as the chief consultant on this project sometime between late 1995 and early 1996.

[6] Initially, the markings were problematic because they were not conspicuous enough to be observed by deep ripper operators. They improved over time, but they probably could not be easily seen at night when much of the deep ripping activity occurred.

been knocked over and marks on the ground indicated that a deep ripper had crossed through the feature several times without its shank raised. Tsakopoulos then conceded that mistakes had been made.

After making his observations on Borden Ranch, Dr. Lee caused to be created a 96-page, 11" x 17" document entitled "Documentation of Impacts" which described the effect that plowing within the studied parcels had on 40 linear features -- *i.e.*, swales and intermittent drainages -- and on six vernal pools. This document was subsequently revised; the current version is dated April 28, 1999. Exh. 148.

B.

Impacts upon Waters of the United States

Dr. Lee's "Documentation of Impacts" is the most thorough documentation that has been made regarding Clean Water Act violations in the relevant portions of Borden Ranch. Based upon his report and other evidence presented during the bench trial, this Court finds that, under the preponderance of the evidence standard, deep ripping on Borden Ranch caused fill material to be discharged into 35 hydrological features situated in parcels 6, 8, 9, and 10 on the San Joaquin County side of the property. Of these 35 features, 28 are or were swales or intermittent drainages that are hydrologically related to navigable, interstate waters. One feature is a depression that is adjacent to a swale that is hydrologically related to navigable, interstate waters. The remaining six features are or were isolated vernal pools. The "drainage" numbers and "depression" numbers that are referred to herein are taken from Dr. Lee's report and testimony. Exh. 148. A "drainage" number refers to either a swale or an

intermittent drainage; a "depression" number denotes an isolated vernal pool.

Parcel 10, shaped roughly like a right triangle, is the northwesternmost parcel on the San Joaquin County side of the property. It shares no boundary with the other parcels on the south side of Dry Creek. Drainage 9 is an approximately 800-foot-long intermittent drainage flowing north to south in the southeast corner of this parcel. It has been completely filled by deep ripping, discing, and the planting of vineyards. The deep ripper shank passed through this drainage several dozen times with its shank down. Drainage 10 is a 1,300-foot-long north/south intermittent drainage flowing to the southern boundary of parcel 10. This wetland also has been nearly completely obliterated due to several passes by a deep ripper with its shank down, subsequent discing and planting with vineyards. Drainage 34 is a swale that runs north to south for approximately 200 feet and reaches the southern border of parcel 10 roughly 850 feet west of drainage 10. This also has been completely filled after several passes with a fully-engaged deep ripper and subsequent discing and planting with grapes. Drainage 35 is another swale, situated near the southwestern corner of parcel 10, which has been deep ripped, disced and planted with vineyards. It was approximately 700 feet long and has been completely filled. Nearby on parcel 10 is drainage 36, which has been completely filled by deep ripping, discing and planting. It had been a swale of approximately 350 feet in length. Along the northwestern boundary of parcel 10 lay a 150-foot long swale, drainage 37, which slopes down toward the northwest and Dry Creek. It also has been completely filled by deep ripping, discing, and planting of vineyards. Approximately 940 feet

to the east of that is drainage 38, a 200-foot-long swale also sloping to the northwest and which has been similarly filled. The final affected feature on parcel 10 is drainage 40, a forked swale totaling 1,450 feet in length and situated in the northeast corner of this parcel. The entire feature is filled after deep ripping; the north-south portion of the swale is planted with vineyards and the east-west stretch is currently used as a dirt road connecting two other roads that run along the eastern and northwestern boundaries of the parcel.

Parcel 8 is a 150-acre portion of Borden Ranch adjacent to and north of Goose Creek. Drainage 5 is an intermittent drainage that flows north to south for 800 feet along the western boundary of the parcel. It has been deep ripped and partially filled in. Drainage 7 is centrally located on the parcel and flows south into Goose Creek. It is an 846-foot-long intermittent drainage and has been partially filled by deep ripping. Drainage 8 is a 1,357-foot-long intermittent drainage which flows south meeting Goose Creek approximately 1,000 feet upstream from drainage 7. It has been deep ripped and partially filled. Depression 2 is a vernal pool located in the northwestern corner of parcel 8, approximately 375 feet west of Mackville Road. The pool had covered an area of roughly 150 square feet, but has been deep ripped, disced, cultivated, and completely filled. Two other, larger vernal pools that lay within approximately 150 feet of this pool were not plowed. Each of them was studied in May of 1997 and March of 1998 and was found to be inhabited by *branchinecta lynchi*, or vernal pool fairy shrimp, a threatened species under the Endangered Species Act. Exh. 138. When the closer of the nearby pools floods, water therein occasionally spills into depression 2, which is located slightly downgrade. Considering the proximity of these pools and this

hydrological relationship with one of them, depression 2 more likely than not served as a habitat for vernal pool fairy shrimp before it was plowed. The last feature on parcel 8 is a 460-foot-long swale -- drainage 20 -- located in the northeast corner of the parcel. This feature has been deep ripped and disced and, resultantly, partially filled.

Parcel 9 is another 150-acre parcel east of parcel 8 and Mackville Road and north of Goose Creek. Drainage 19 flows for approximately 1,620 feet southward near the western boundary of the parcel and into the Creek. This feature starts as a swale and, after 900 feet, acquires the characteristics of an intermittent drainage. The upper swale portions have been partially filled due to deep rippers plowing to the edge of the feature and depositing soil into the swale. The lower intermittent drainage has been similarly affected by adjacent deep ripping. Drainage 23, a 430-foot-long swale, is another feature adjacent to which there has been deep ripping that has lead to a discharge of fill material into the wetland. Situated in the northeastern corner of parcel 9, drainage 29 is a "Y"-shaped swale totaling 1,077 feet in length into which, due to proximate deep ripping, a small amount of fill material has been deposited. To the west of drainage 29 are drainages 30 and 31. These north-to-south swales have been deep ripped through near where they meet Goose Creek, resulting in significant discharges of fill into each body of water. Upon Dr. Lee's visit to these swales, he observed continuous furrows measuring approximately two feet from the base of the trench to the top of the mounds on each side and stretching perpendicularly across each feature at intervals of approximately 15

feet.[7] A vernal pool designated depression 1 lay north of drainages 30 and 31. This is the pool whereat Tsakopoulos himself witnessed that plows had knocked over the metal stakes which had surrounded the feature. Approximately 215 square feet in area, this pool has been completely obliterated by deep ripping and discing; however, the pool was deep ripped through in only one direction, rather than two directions like the adjacent uplands. Sampling of the pool in May of 1997 demonstrated the presence of certain vernal pool obligate plant species, including Eryngium and Psilocarphus. These species can only survive in wetlands that are inundated for a substantial portion of the year. However, there has been no showing that vernal pool fairy shrimp inhabited this or any nearby pool. Nor has it been shown that this pool supported any other threatened or endangered species prior to its having been deep ripped. There is credible evidence in the record that certain migratory birds were spotted on other, rather distant portions of Borden Ranch[8] and evidence reveals that relatively small vernal pools like depression 1 can be used by migratory birds for feeding, resting, cover, and breeding. However, it has not been demonstrated that depression 1 was a potential habitat for migratory birds. The final relevant feature in parcel 9 is drainage 32, an intermittent drainage 300 feet in length that has been deep ripped,

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[7] Tsakopoulos has attempted to attribute these phenomena to deep rippers passing over the swales with the shank raised to the uppermost position. However, the evidence reveals that the furrows were not caused by shanks tagging the surface.

[8] Over the course of at least seven-days' observations over the course of the year May of 1997 through April of 1998, migratory birds apparently were sighted only once within 1,000 feet of this pool; on June 19, 1997, horned lark were spotted somewhere along drainage 30, which is situated 300 feet from depression 1 at its closest point and 900 feet at its farthest. Exh. 146.

disced, and planted. Resultantly, this feature is nearly completely obliterated.

The final parcel at issue, number 6, is located on Borden Ranch south of Goose Creek. Depressions 3 through 6 -- vernal pools situated in the southwesternmost portion of the parcel -- have been completely obliterated by deep ripping and discing. These four pools were each approximately 150 square feet in size. Approximately 175 feet north-northeast of depression 3 there exists a vernal pool -- one much larger in size than the plowed pools -- in which vernal pool fairy shrimp were found during sampling in May of 1997. Exh. 138. However, thorough sampling of depressions 3 through 6 revealed no threatened or endangered species.[9] There is also insufficient evidence in the record to establish either that vernal pool obligate plant species inhabited these pools, that these pools were hydrologically related to a pool inhabited by a threatened or endangered species, or that such a species had been or would be brought to one or more of these pools via some other mechanism, such as through its attachment to wildlife that had or would frequent other pools. Additionally, it has not been demonstrated that any of these pools could potentially serve as habitat for migratory birds.

Turning to the linear hydrological features of parcel 6, drainage 1 is a multi-branched hydrologically-interrelated system broken down by Dr. Lee into six features: four swales, an intermittent drainage, and a depression. Only three of them are alleged to constitute violations. Drainage 1C is in fact an ellipse-shaped

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[9] In testing each of depressions 3 through 6, twice as much material was sampled as was taken from other vernal pools on Borden Ranch.

depression measuring approximately 38 feet on its longer axis. This depression is adjacent to drainage 1B, which is a swale that flows into drainage 1A and ultimately into Goose Creek. Twelve linear feet at one end of drainage 1C have been deep ripped and disced; resultantly, that end of the depression has been completely filled. Drainage 1D is a 458-foot-long swale and drainage 1E is a 150-foot-long swale. Each has been deep ripped, disced, and partially filled. Situated at the western boundary of parcel 6, drainages 3 and 4, are swales that have been partially filled by deep ripping and discing. A 2,080-foot-long intermittent drainage which flows northward toward Goose Creek -- drainage 13 -- also has been partially filled by deep ripping and discing. Nearby, drainages 14, 15, and 18 are smaller features which have been deep-ripped across at certain points. Fill has been deposited therein as a result. Finally, drainages 25 and 26 are situated on the eastern "panhandle" portion of parcel 6; these features have been subjected to substantial discharges of fill -- drainage 25 has been totally filled -- as a result of deep ripping and discing across these wetlands. A 103-foot-long portion of drainage 26 has been completely filled and soil is mounded along where the water in this part of the feature had flowed.

II.

CONCLUSIONS OF LAW

Conclusions of law and further findings of fact necessary to reach certain legal conclusions follow.

A.

Burden of Proof

The EPA bears the burden of proving by a preponderance of the evidence that Tsakopoulos has violated the Clean Water Act; this

"simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence." Concrete Pipe & Products, Inc. v. Constr. Laborers Pension Trust, 508 U.S. 602, 622 (1993) (quoting In re Winship, 397 U.S. 358, 371-372 (1970) (Harlan, J., concurring)) (internal quotations omitted). Tsakopoulos has raised the defense of estoppel to a portion of the EPA's counterclaims. The burden of proving this defense rests upon Tsakopoulos. See United States v. Omdahl, 104 F.3d 1143, 1146 (9th Cir. 1997).

B.

The Clean Water Act

The Clean Water Act prohibits "the discharge of any pollutant by any person" from any "point source" into waters of the United States absent compliance with, *inter alia*, section 1344. 33 U.S.C. §§ 1311(a), 1362(7, 12).[10] A "pollutant" is defined to include "dredged spoil, . . ., rock, [or] sand . . . discharged into water." Id. § 1362(6). A "point source" is a "discernible, confined and discrete conveyance," and, under the circumstances of this case, includes a plow. Id. § 1362(14); see also August 3, 1998, Order at 11-12 (citing cases).

The EPA is empowered to "prescribe such regulations as are necessary to carry out [its] functions" under the Clean Water Act. 33 U.S.C. § 1361(a). Pursuant to this authority, the agency has defined "waters of the United States" to include interstate waters and wetlands, intrastate waters and wetlands "the use, degradation, or

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[10] Unless otherwise noted, all references herein to sections are to sections of Title 33 of the United States Code.

destruction of which could affect interstate or foreign commerce," and wetlands adjacent to such waters. 40 C.F.R. § 232.2. "Wetlands" are "areas inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions" and generally include "swamps, marshes, bogs, and similar areas." Id. In the preamble to its regulations, the EPA clarified that interstate commerce would typically be affected by the destruction of waters "[w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties[, w]hich are or would be used as habitat by other migratory birds which cross State lines[,] or [w]hich are or would be used as habitat for endangered species." 53 Fed. Reg. 20,764, 20,765 (1988); see also 51 Fed. Reg. 41,206, 41,217 (1986) (preamble to the Corps's regulations).[11]

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[11] The EPA further stated in its preamble that,

> if evidence reasonably indicates that isolated waters are or would be used by migratory birds or endangered species, they are covered by EPA's regulation. Of course, the clearest evidence would be evidence showing actual use in at least a portion of the waterbody. In addition, if a particular waterbody shares the characteristics of other waterbodies whose use by and value to migratory birds as [sic] well established, and those characteristics make it likely that the waterbody in question would also be used by migratory birds, it would also seem to fall clearly within the definition (unless, of course, there is other information that indicates the particular waterbody would not in fact be so used). Endangered species are, almost by definition, rare. Therefore, in the case of endangered species, if there is no evidence of actual use of the waterbody (or similar waters in the area) by the species in question, one could actually assume that the waterbody was not susceptible to use by such species, notwithstanding the particular characteristics of the waterbody. However, in each case a specific determination of

(continued...)

Section 1344 allows the Corps to issue permits allowing the discharge of "dredged or fill material" into waters of the United States. 33 U.S.C. § 1344(a, d). Certain practices are exempt from section 1311(a)'s prohibition of discharges of dredged or fill material and the attendant permit requirement; these activities include "normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices." Id. § 1344(f)(1). However, pursuant to regulations promulgated by the EPA, this exemption is limited to "established (i.e., ongoing) farming, silviculture, or ranching operation" and not to "[a]ctivities which bring an area into farming, silviculture or ranching use" or which target an area which "has lain idle so long that modifications to the hydrological regime are necessary to resume operation." 40 C.F.R. § 232.3(c)(1)(ii)(A, B). Tsakopoulos's activities on Borden Ranch thus do not qualify for this exemption. See August 3, 1998, Order at 14-18.

Section 1319(b) authorizes the EPA to commence a civil action for appropriate relief, including a permanent or temporary injunction, for violations of the Clean Water Act. A civil penalty for such violations is established by section 1319(d), which provides, in pertinent part:

> Any person who violates section 1311 . . . of this title . . . shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In

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[11](...continued)
jurisdiction would have to be made, and would turn on the particular facts.

53 Fed. Reg. 20,765.

> determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

The civil penalty for violations occurring after January 30, 1997, has been raised to $27,500. 40 C.F.R. §§ 19.2 & 19.4; Debt Collection Improvement Act of 1996, Pub. L. 104-134, Title III, § 31001(s), 110 Stat. 1321-373 (April 26, 1996) (codified at 28 U.S.C. § 2461 note). This Court also has jurisdiction to issue injunctive relief to "restrain [any] violation and to require compliance" with the Act. 33 U.S.C. § 1319(b). Therefore, an injunction may be issued which requires restoration, replacement, or mitigation for any damaged jurisdictional waters as may be required by equity. United States v. Telluride Co., 146 F.3d 1241, 1247 (10th Cir. 1998); United States v. Cumberland Farms of Connecticut, Inc., 826 F.2d 1151, 1164 (1st Cir. 1987) (citing Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982)).

The EPA seeks the imposition of a civil penalty upon Tsakopoulos and an injunction requiring restoration of the features which have been damaged and/or the creation of similar features elsewhere.

C.

Violations of the Clean Water Act

1.

Jurisdictional Features Affected

The swales and intermittent drainages enumerated by Dr. Lee as drainages 1C, 1D, 1E, 3, 4, 5, 7, 8, 9, 10, 13, 14, 15, 18, 19, 20,

23, 25, 26, 29, 30, 31, 32, 34, 35, 36, 37, 38, and 40 are "wetlands" constituting "waters of the United States" within the meaning of 40 C.F.R. § 232.2, and come within the protection of the Clean Water Act. The isolated vernal pool referred to as depression 2 was or would have been inhabited by *branchinecta lynchi*, a threatened species under the Endangered Species Act, and the destruction of this pond affected interstate commerce within the meaning of 40 C.F.R. § 232.2; therefore, this feature also was a jurisdictional water. Tsakopoulos violated the Clean Water Act when, without a permit from the Corps, he allowed deep rippers to plow and cause fill to be deposited into these features in 1995 through 1997. He further violated the Act by allowing discing of the vernal pool.

Depressions 1, 3, 4, 5, and 6 are isolated vernal pools which have no demonstrated connection with interstate commerce. Given the relatively small size of these pools, and the lack of evidence indicating that any migratory bird or any endangered species have utilized or would utilize them as habitat, these vernal pools are not waters of the United States protected under the Clean Water Act. Therefore, Tsakopoulos did not violate the Act when he caused the deep ripper to pass through or deposit fill into these features.

2.

Estoppel Defense

Tsakopoulos argues that the EPA should be estopped from seeking recovery for any of the violations alleged to have occurred in linear features because he was told that he could drive the deep rippers over the swales and intermittent drainages with the shank raised to its uppermost position and because the government assertedly "was aware" that this would cause the blade of the shank to be dragged

through the ground at a depth of six inches or more. Tsakopoulos's Trial Brief at 42-43. The elements of estoppel are "(1) the party to be estopped knows the facts, (2) he or she intends [or it is reasonably believed that he or she intends] that his or her conduct will be acted on . . ., (3) the party invoking estoppel must be ignorant of the facts, and (4) he or she must detrimentally rely on the former's conduct." Lehman v. United States, 154 F.3d 1010, 1016 (9th Cir. 1998) (quoting United States v. Hemmen, 51 F.3d 883, 892 (9th Cir. 1995)). This defense fails for several reasons. First, when a deep ripper of the type used on the parcels at issue in this case is operated with its shank raised to the uppermost position, the blade of the shank will not drag through the ground but might occasionally tag the ground when the machine is jostled by bumps on the ground. Second, those agents of the government who instructed Tsakopoulos that the deep rippers could be driven over the swales and intermittent drainages did not believe that the blade of the shank would drag continuously through the ground. Rather, they believed, based upon the statements of Andy Johas, that the blade could be lifted completely out of the ground but could tag raised ground areas in its path. Finally, even if Johas were to have been mistaken when he told the government's agents that the shank could be lifted entirely out of the ground, it is clear that those agents relied upon that advice when they told Tsakopoulos that the deep rippers could be driven over the swales and intermittent drainages. Therefore, the defense of estoppel fails because "the party to be estopped" would not have "know[n] the facts." Id. at 1016.

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D.

The Civil Penalty

Where there has been a violation of the Clean Water Act, the imposition of a civil penalty is "mandatory." Leslie Salt Co. v. United States, 55 F.3d 1388, 1397 (9th Cir.), cert. denied, 516 U.S. 955 (1995). However, "[d]istrict courts retain the broad discretion to set a penalty commensurate with the defendant's culpability." Id. Under a framework utilized by several courts, known as the "top-down method," the district court first ascertains the maximum civil penalty, and then "determine[s] if the penalty should be reduced from the maximum by reference to the statutory factors." Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546, 573 (5th Cir. 1996) (citing Atlantic States Legal Found., Inc. v. Tyson Foods, Inc., 897 F.2d 1128, 1142 (11th Cir. 1990)); see also United States v. Mun. Auth. of Union Township, 150 F.3d 259, 265 (3d Cir. 1998); Hawaii's Thousand Friends v. City and County of Honolulu, 821 F. Supp. 1368, 1395 (D. Haw. 1993).[12] In enacting section 1319(d), "Congress wanted the district court to consider the need for retribution and deterrence, in addition to restitution, when it imposed civil

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[12] Another framework, known as the "bottom-up method," has been used by some courts and entails "begin[ning] with the violator's economic benefit from non-compliance . . . and then adjust[ing] up or down based on the court's evaluation of the six factors set out in [section 1319(d)]." United States v. Smithfield Foods, Inc., ___ F.3d ___, ___, 1999 WL 713847, at *11 (4th Cir. Sept. 14, 1999). However, the Clean Water Act "does not require the use of either method." Id. at *11 n.7; see also Mun. Auth. of Union Township, 150 F.3d at 265 ("it appears that a court is free to use its discretion in choosing the appropriate method"). In light of the fact that, as discussed in section II.D.2.b., *infra*, determining what economic benefit Tsakopoulos derived from violating the Clean Water Act involves a relatively high amount of uncertainty, using the bottom-up method as the baseline for a civil penalty would not be desirable. Therefore, the top-down method will be utilized in this case.

penalties." Tull v. United States, 481 U.S. 412, 422 (1987) (citing 123 CONG. REC. 39,191 (1977)).

The EPA seeks the imposition of a civil penalty of $875,000, which represents the product of multiplying 35 affected features by $25,000. Tsakopoulos argues that, if a civil penalty is to be imposed, it should not exceed $97.26 based upon the penalty imposed as part of a Consent Decree entered April 28, 1997, in United States v. Simpson Timber Co., Case No. CIV. S-96-1890 LKK GGH, a case formerly pending in this United States District Court. Tsakopoulos's Trial Brief at 55 (as corrected Aug. 11, 1999); id. at 36 n.16 (obtaining the $97.26 figure by dividing the $30,000 penalty agreed to in Simpson Timber by the 987 acres of lands affected in that case, and by multiplying this per-acre amount by the 3.2 acres allegedly affected in this case).

1.

The Maximum Civil Penalty

Under section 1319(d), the maximum penalty depends upon two numbers: the number of "day[s]" the Act is violated and the number of "violation[s]" that have occurred. The EPA argues that the number of violations in this case equals the number of times that a deep ripper passed through a water of the United States plus the number of times that a vernal pool was disced. EPA's Trial Brief at 27 & n.6. The EPA estimates that 29 swales and intermittent drainages were passed through with a deep ripper a total of 1,100 times. Id. at 27-28 n.7.[13] No estimate is offered for how many violations occurred in the

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[13] This stems from the hypothesis that all of these features were crossed in one direction 25 times and that 15 of them were crossed in another direction an additional 25 times. Id. Therefore, (continued...)

vernal pools. The EPA also contends that every day since these violations occurred constitutes another day to be used in calculating the maximum penalty because fill has been allowed to remain in a jurisdictional water. Id. at 28 (citing United States v. Key West Towers, Inc., 720 F. Supp. 963 (S.D. Fla. 1989), and United States v. Ciampitti ("Ciampitti II"), 669 F. Supp. 684 (D.N.J. 1987)). The EPA failed to estimate the maximum civil penalty, suggesting only that the maximum penalty for all violations "is in the hundreds of millions of dollars." Id. at 36. Nor has Tsakopoulos attempted to identify either the number of violations, the relevant number of days, or the maximum civil penalty applicable in this case.

A "violation" within the meaning of section 1319(d) occurred whenever an unpermitted discharge took place. The Act defines a "discharge" as an "addition" of a pollutant to a jurisdictional water. 33 U.S.C. § 1362(12). The EPA's argument that merely failing to remove fill from a jurisdictional water constitutes a separate violation of the Clean Water Act is unpersuasive. Rather, the day on which a discharge occurred is the only day that will be counted in determining the maximum penalty. Further, the features which have been deep ripped involve more than one violation of the Clean Water Act because of the repeated passes by the deep rippers over these features. The parties apparently agree that each pass constitutes a separate violation. Tsakopoulos concedes that a few passes through certain features might have accidentally occurred. The evidence reveals that some of the linear features, including drainages 30 and

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[15](...continued)
the EPA estimates that, on average, each linear feature was deep ripped approximately 38 times.

31, were only deep ripped a few times in localized areas. Other features were simply too small to conclude that they had been passed through with a deep ripper more than 5 to 10 times. Considering its size, the vernal pool was most likely deep ripped and/or disced approximately 10 times. On average, each of the 29 linear jurisdictional features was passed through with a fully-engaged deep ripper approximately 12 times. Each of these passes-through caused fill to be deposited into waters of the United States. Therefore, Tsakopoulos committed 358 violations of the Clean Water Act.[14] Finally, eyewitness evidence reveals that, in April of 1997, deep ripping of unspecified jurisdictional features occurred on parcel 8. However, there is insufficient evidence to establish that the witnessed activity, or any other deep ripping activity, affected any of the features listed in part II.C.1., *supra*, at any time after January 30, 1997, -- the date after which the penalty for violating the Clean Water Act increased to $27,500. 40 C.F.R. § 19.2.[15] Thus the maximum penalty applicable to each of the 358 violations is $25,000. Therefore, the maximum civil penalty applicable in this case is $8,950,000.

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[14] The total violations number is calculated by multiplying the average number of passes by a deep ripper (12) by the number of linear jurisdictional features (29), which equals 348; and then adding to this number the 10 violations in the vernal pool, which yields 358.

[15] In its trial brief, the EPA notes the increased maximum civil penalty applicable to violations after January 30, 1997, but does not argue that any of Tsakopoulos's violations are subject to this heightened penalty.

2.

Statutory Factors

a.

The Seriousness of the Violations

The first statutory factor concerns the seriousness of the violations, their number and continuous nature. Sierra Club, Lone Star Chapter, 73 F.3d at 574; Pub. Interest Research Group of N.J. v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 79 (3d Cir. 1990); Hawaii's Thousand Friends, 821 F. Supp. at 1395; Natural Resources Defense Council, Inc. v. Texaco Ref. & Mktg., Inc., 800 F. Supp. 1, 23 (D. Del. 1992). The EPA argues that this factor weighs in favor of a significant penalty in light of the number of discharges, the duration those discharges have remained in the jurisdictional waters, and the impact deep ripping has had on the hydrological functioning of the affected linear features and on the ability of vernal pools to support endangered species. Tsakopoulos counters that, compared with the impact of the violations which were alleged in Simpson Timber, his violations in this case are less serious. Further, Tsakopoulos argues that the wetlands on Borden Ranch remain functional and flowing.

Tsakopoulos has not shown that the settlement reached in the Simpson Timber case has any relevance to the determination of an appropriate civil penalty in this case. Simpson Timber was resolved by a consent decree rather than through litigation and adverse judgment. Besides, Tsakopoulos focuses only on the monetary amount of the civil penalty in Simpson Timber and disregards the restoration measures required by the consent decree. Some of these measures created ecological preserve properties to assist in the preservation of valuable natural resources, including vernal pools. These

restoration measures could have been imposed in lieu of a more significant civil penalty consistent with the objectives of the Clean Water Act.

However, Tsakopoulos correctly points out that his asserted violations of the Clean Water Act affected a relatively small area of jurisdictional waters. As Dr. Lee's findings show, the aggregate area filled by deep ripping is 2.34 acres of wetlands. This number includes approximately 0.02 acres of isolated vernal pools over which the government argued jurisdiction existed. However, the EPA's jurisdiction over these pools extends only to the one known as depression 2, which, according to Dr. Lee's testimony, covered approximately 150 square feet. Although the evidence adduced at trial pertaining to the amount of jurisdictional wetlands affected was not clear enough to ascertain the exact acreage of land adversely affected by Tsakopoulos's wrongful filling activities, it demonstrated that approximately 2 acres of jurisdictional wetlands were caused to be filled by deep ripping.

The hydrology of each of the 30 features affected has been altered significantly. Several of them -- drainages 9, 10, 34, 35, 36, 37, 38, and 40 and depression 2 -- are completely obliterated. Many of the remaining features have been "clipped" and/or partially filled. While the precise environmental impact these violations have had or will have on the effected wetlands is not pellucid as to some of the features, the damage attributable to these violations, including the diminished effectiveness of these features in filtering pollutants in the water system and the decrease in exotic plant and animal life, will accumulate well into the future. Dr. Lee credibly testified about these anticipated effects. Tsakopoulos's contrary

contention that these features have not been significantly affected by the plowing and deep ripping activity is unpersuasive. However, considering the nature of Tsakopoulos's violations, imposition of the maximum penalty allowed under law is not required. But the nature of his deep ripping and plowing activity degraded or destroyed wetlands considered valuable by Congress and warrants a substantial civil penalty.[16]

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[16] Congress has made the following findings concerning wetlands:

> (1) wetlands play an integral role in maintaining the quality of life through material contributions to our national economy, food supply, water supply and quality, flood control, and fish, wildlife, and plant resources, and thus to the health, safety, recreation, and economic well-being of all our citizens of the Nation;
> (2) wetlands provide habitat essential for the breeding, spawning, nesting, migration, wintering and ultimate survival of a major portion of the migratory and resident fish and wildlife of the Nation; including migratory birds, endangered species, commercially and recreationally important finfish, shellfish and other aquatic organisms, and contain many unique species and communities of wild plants;
> . . . .
> (4) wetlands, and the fish, wildlife, and plants dependent on wetlands, provide significant recreational and commercial benefits, including-- . . . (C) fishing, hunting, birdwatching, nature observation and other wetland- related recreational activities . . .;
> (5) wetlands enhance the water quality and water supply of the Nation by serving as groundwater recharge areas, nutrient traps, and chemical sinks;
> (6) wetlands provide a natural means of flood and erosion control by retaining water during periods of high runoff, thereby protecting against loss of life and property;
> (7) wetlands constitute only a small percentage of the land area of the United States, are estimated to have been reduced by half in the contiguous States since the founding of our Nation, and continue to disappear by hundreds of thousands of acres each year . . ..

16 U.S.C. § 3901(a).

b.

The Economic Benefit Resulting from the Violations

The next factor concerns whether Tsakopoulos derived an economic benefit from the deep ripping activity on federal wetlands. The economic benefit flowing to a violator must be considered "to prevent [the] violator from profiting from [his] wrongdoing." Mun. Auth. of Union Township, 150 F.3d at 263. The goal is "to remove or neutralize the economic incentive to violate environmental regulations." Id. at 264; see also Smithfield Foods, ___ F.3d at ___, 1999 WL 713847, at *12; Pub. Interest Research Group of N.J., 913 F.2d at 80. "[T]he precise economic benefit a polluter has gained by violating [the Act] may be difficult to prove, so '[r]easonable approximations of economic benefit will suffice.'" Smithfield Foods, 1999 WL 713847, at *12 (quoting and altering S. REP. No. 50, 99th Cong., 1st Sess. 25 (1985)); see also Sierra Club, Lone Star Chapter, 73 F.3d at 576; Pub. Interest Research Group of N.J., 913 F.2d at 80. The EPA suggests that "Tsakopoulos benefitted economically in several ways as a result of proceeding with deep ripping without obtaining a permit." EPA's Trial Brief at 32. The EPA argues he avoided the cost of pursing authorization to deep rip the jurisdictional features and mitigation costs that would have been required by the government for him to receive a permit. Id. at 33. Second, he saved interest costs that would have accrued had he gone through with the permitting process and, resultantly, not been able to sell parcels 6, 8, 9, and 10 as quickly as he did. Third, he received profit from those sales sooner than he would have if a permit application had been properly submitted and processed. Id. The EPA's economics expert testified that the total economic benefit, obtained by adding these (and certain

other) elements together, equals $1,039,628.[17] Also, the EPA points to the tremendous profit that Tsakopoulos has earned as a result of his conversion activities on Borden Ranch. Tsakopoulos purchased parcels 6, 8, 9, and 10 for $605,323 and has since sold this land for $3,123,914. However, he incurred approximately $673,000 in land preparation, selling, interest, and other costs in the interim.[18]

Tsakopoulos argues that he has not benefitted economically at all from the violations. The properties at issue were converted for use as vineyards and then sold at a price per gross acre, rather than per farmable acre, so that there was no economic incentive to fill the wetlands, and no benefit from doing so. Tsakopoulos's Trial Brief at 54. Tsakopoulos also points out that he did expend *some* additional time and money in attempting to comply with the Clean Water Act. Id.

The acreage involved in these violations constitutes a minuscule fraction of the total land converted to vineyards in parcels 6, 8, 9, and 10. Therefore, deeming his profits from the sale of these parcels to be the economic benefit derived solely from his violations would not reflect the extent of his economic gain. But Tsakopoulos did save money by selling the relevant parcels earlier

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[17] According to the EPA's expert, from avoiding the cost of mitigation, Tsakopoulos benefitted by holding this money himself for an economic benefit of $416,687. From early sales, he benefitted $601,359; and from failing to properly flag jurisdictional wetlands on parcel 10 prior to deep ripping, he saved $21,582.

[18] Also, according to the EPA's expert, Tsakopoulos has sold half of the land on Borden Ranch for approximately $17 million, and the remaining portion is worth approximately $7.7 million. Thus, Tsakopoulos stands to make a gross profit of roughly $16.4 million from the Borden Ranch deal, without taking into account conversion, interest, and other costs.

than he would have realized had he taken the time to comply with the Act. It is clear that he moved with celerity in his deep ripping activities because of the prospect of making an enormous profit, the immediate availability of this profit, and the ability to avoid expense and delay he perceived attended to action that would ensure compliance with the Clean Water Act. Thus he risked damaging rare federal wetlands because of his motivation to reap economic gain. This factor favors a substantial penalty, but the extent of the economic benefit is uncertain. Where the precise economic benefit is difficult to determine, "reasonable approximations of economic benefit will suffice." Pub. Interest Research Group of N.J., 913 F.2d at 80.

c.

Any History of Such Violations

The parties dispute what should be considered when evaluating the history Tsakopoulos has had with the Act and what weight should be given to that history. Tsakopoulos's past alleged violations of the Act include those committed prior to 1993 at sites other than Borden Ranch, those committed on the Castlehill parcel in the fall of 1993, those committed on the Prudential parcel in the fall of 1994, and others committed on the Sacramento County side of Borden Ranch in 1995. Tsakopoulos points out that the AOC entered into on May 3, 1996, fully considered these violations and reached a settlement that sufficiently penalized Tsakopoulos even though he was not required to admit wrongdoing. Tsakopoulos indicates that the AOC fully required him to make amends for what occurred on the Sacramento County side of Borden Ranch, and reflects a penalty equal to what the government was likely to have obtained had the matter been fully prosecuted instead of settled. When the EPA considered an appropriate

penalty and mitigation in the AOC, and extracted from Tsakopoulos 1,368 acres of land for preserves and nearly $45,000, the EPA must have considered and intended to resolve the Sacramento County and all prior violations of the Clean Water Act (and violations of the Endangered Species Act) that Tsakopoulos had committed. While his history is problematic, the federal government dealt with it and appears to have fully considered it in the AOC. The EPA disagrees, contending that since Tsakopoulos committed further violations of the Act he "vitiated" the AOC by breaching the promise he made in the AOC that he would not engage in further violations. See Exh. 66 at 11. Therefore, the EPA argues that the parties' settlement reflected in the AOC should be disregarded and the Court should begin anew when considering a penalty for Tsakopoulos's current violations in light of similar violations he allegedly committed in the past.

In determining the history of all of the violations, the Court is required to consider the duration and nature of them all, "including whether the violations are perpetual or sporadic." United States v. Smithfield Foods, 972 F. Supp. 338, 349 (E.D. Va. 1997) (citing cases), rev'd in part on other grounds, ___ F.3d ___, 1999 WL 713847 (4th Cir. Sept. 14, 1999). A review of the AOC, in light of the trial testimony concerning Tsakopoulos's history, reflects Tsakopoulos had problems complying with the requirements of the Clean Water Act, but leads to the conclusion that the penalty under consideration now should supplement rather than supplant the governmental enforcement action reflected in the AOC. The AOC represents a final agency enforcement action that evinces the government utilized considerable expertise as it diligently concluded an administrative agreement with Tsakopoulos which fosters the goals

of the Act. No reason has been presented justifying undoing the agreement reached in the AOC. However, Tsakopoulos's violation of the AOC itself by reneging on his assurance to comply with the Act is of historical significance and weighs in favor of a more severe penalty. Although all of Tsakopoulos's past history is considered, it is not evaluated in the light desired by the EPA.

d.

Any Good-Faith Efforts to Comply with Applicable Requirements

The next factor concerns whether Tsakopoulos made good faith efforts to comply with the Clean Water Act. This factor generally focuses on whether the violator took any actions to decrease the number of violations and whether he made an effort to mitigate the impact of his violations. Smithfield Foods, 972 F. Supp. at 350 (citing cases).

The EPA contends that Tsakopoulos undertook virtually no efforts to comply with the Clean Water Act and regulations promulgated thereunder, disregarded the government's warnings and "chose to go forward in San Joaquin County without a permit and in a manner that essentially assured that the rippers would impact jurisdictional waters." EPA's Trial Brief at 34, 35. The evidence indicates that Tsakopoulos's agents utilized the deep ripping equipment almost 24 hours per day with little or no supervision at night, and in a manner which seemed impervious to the substantial risk of ripping and depositing fill into federal wetlands. These facts strongly indicate a lack of good faith.

Tsakopoulos points out that he told the government about his plans for Borden Ranch as soon as he realized he would purchase the property and there was evidence that he made some efforts to mark

jurisdictional features. However, the EPA correctly asserts that Tsakopoulos repeatedly failed to adhere to the regulatory scheme and occasionally acted as though he did not recognize the authority of the Corps and the EPA in his dealings with them. And although Tsakopoulos quibbled with the Corps's enforcement authority, he knew that the Corps had clearly directed him not to deep-rip federal wetlands. However, the evidence does reveal that Tsakopoulos apparently intended to avoid the necessity of obtaining a permit on parcels 6, 8, 9, and 10 by avoiding deep ripping jurisdictional waters therein. He sought and received the government's guidance regarding what activities he could undertake without a permit. While certain federal officials apparently anticipated that he would submit permit applications for these parcels before he deep ripped them it is unclear why he would need a permit if he intended to avoid jurisdictional waters.

Yet the evidence reveals that Tsakopoulos expended little effort to comply with the Act prior to the summer of 1996. It is undisputed there was deep ripping taking place on parcels 6 and 10 prior to the preparation and verification of a jurisdictional wetlands delineation map, which did not take place until the spring and summer of that year. Final Pretrial Order filed May 27, 1999, ("the Final Pretrial Order") at 4-5. Without such a map, it is unclear how Tsakopoulos's agents could successfully avoid all jurisdictional features. The evidence further shows that in September of 1996 some flagging and staking was done on the San Joaquin County side, particularly around vernal pools. Nevertheless, deep ripping of jurisdictional features still occurred. Tsakopoulos testified that he relied upon his agents to ensure compliance with the government's guidance regarding driving over the swales and intermittent drainages.

But these agents had an unvigilant attitude towards compliance with the Clean Water Act on Borden Ranch. Finally, between September of 1994 and September of 1996, Tsakopoulos deliberately obfuscated his understanding of the Corps's guidance respecting driving over vernal pools and undermined the Corps's enforcement authority by wrongly stating the agency gave him confusing guidance as to the nature of the contact he could have with jurisdictional waters. He knew he was not authorized to deep rip any jurisdictional features.[19] These findings weigh against good faith. While confusion did exist as to whether Tsakopoulos needed a permit prior to deep ripping outside jurisdictional features, Tsakopoulos understood his responsibility to avoid federal jurisdictional features as early as September of 1994. Yet some of his agents failed to avoid those features. For instance, the evidence demonstrates that there was no serious effort to avoid waters of the United States when deep rippers plowed nearly all of parcel 10. This is indicative of the absence of a good faith attempt to comply with the Act. This factor favors the imposition of a significant civil penalty.

e.

The Economic Impact of the Penalty on the Violator

Another factor concerns the economic impact a civil penalty would have on Tsakopoulos. However, he has entered into a stipulation with the EPA, filed under seal March 12, 1999, wherein he agrees in substance that the economic impact of a penalty on him need not be

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[19] The government's internal discussions about the extent of its authority under the Clean Water Act, and the portion of that debate that surfaced at one of Tsakopoulos's meetings with federal officials, are irrelevant since Tsakopoulos knew that the Corps's direction to him about his activities on jurisdictional waters was clear and consistent.

considered in determining whether the civil penalty imposed should depart from the maximum allowed under the Clean Water Act. Further, in the Final Pretrial Order, Tsakopoulos agreed that he "has the financial resources to respond to any judgment which the Court may make." Id. at 21. Therefore, this factor does not affect the severity of the penalty.

f.

Other Matters Required by Justice

Further, section 1319(d) requires consideration of "such other matters as justice may require" in fashioning a civil penalty. The EPA argues that this Court ought to consider the need to deter "the regulated community" from violating the Clean Water Act through the imposition of a severe civil penalty. EPA's Trial Brief at 36. Otherwise, the EPA argues, the government's regulatory program could be subverted. Tsakopoulos does not dispute these contentions. This factor is relevant and does weigh in favor of the imposition of a more severe civil penalty. See United States v. Mun. Auth. of Union Township, 929 F. Supp. 800, 809 (M.D. Pa. 1996), aff'd, 150 F.3d 259 (3d Cir. 1998).

No other matter is asserted to be, or appears to be, pertinent to this determination. Consequently, the amount of the civil penalty is determined.

3.

The Amount of the Civil Penalty

Although the maximum civil penalty under the statute is $8,950,000, the EPA seeks a lesser penalty, and injunctive relief that would require Tsakopoulos to make appropriate restoration for depriving the United States government and its people of wetlands.

The EPA's approach bespeaks that public policy interests will be served best by restoration on Borden Ranch and/or other properties owned by Tsakopoulos. This would foster the congressional goal of protecting federal wetlands. "Congress has determined that 'the . . . destruction of the Nation's wetlands is causing [such] serious, permanent ecological damage,' . . . that wetlands merit protection by laws . . .." United States v. Larkins, 657 F. Supp. 76, 86 (W.D. Ky. 1987) (quoting STAFF OF SENATE COMM. ON THE ENVIRONMENT, 95TH CONG., 2D SESS., A LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977, 869-70 (Comm. Print 1978)). The issue is what monetary legal penalty should be imposed and whether Tsakopoulos could avoid any portion of that penalty by restoring damaged or destroyed wetlands. On balance, the statutory factors dictate that Tsakopoulos either must pay a stiff civil penalty or make appropriate restoration for depriving the nation of wetlands that support wildlife and endangered species. This is consistent with the EPA's policy of accepting "consent decree provisions which allow the reduction of a civil penalty assessment in recognition of the defendant's undertaking an environmentally beneficial 'mitigation project.'" Sierra Club, Inc. v. Elec. Controls Design, Inc., 909 F.2d 1350, 1354 n.6 (9th Cir. 1990) (quoting the EPA's "Clean Water Act Penalty Policy for Civil Settlement Negotiations" (1986)).

The relative seriousness of Tsakopoulos's violations and his lack of earnest effort to comply with the Act merit a significant penalty in order to achieve appropriate retribution. Tsakopoulos realized his obligation to ensure his agents avoided deep ripping federal wetlands but failed to devise a ripping operation sufficient to avoid these jurisdictional features. The plan developed created a plain and obvious risk that others would rip these features because it

authorized ripping to occur almost continuously without enough supervision, and even in the wee hours of the morning and night. The haste involved in this ripping activity was driven by a profit motive -- to make parcels of Borden Ranch conducive for vineyards so that sales of the properties could be consummated. The economic benefit Tsakopoulos obtained from his haste enabled him to realize a quicker sale of deep ripped property, which included deep ripped jurisdictional wetlands. Reaping such benefits at the expense of damaging rare federal wetlands is intolerable under the Act and preponderates toward a significant penalty to achieve the goal of deterrence.

On balance, all the considered factors warrant imposition of a civil penalty pursuant to 33 U.S.C. § 1319(d). Tsakopoulos is fined $1,500,000 for his 358 violations of the Clean Water Act. However, Tsakopoulos may suspend payment of $1,000,000 of this penalty and reduce it to $500,000 if he completes the restoration measures identified in the injunctive relief portion of this Order. If Tsakopoulos elects to undertake such restoration measures, he must file a written notice so stating within 30 days of the date on which this Order is filed.

E.

Injunctive Relief

The restoration measures favored by the EPA are given considerable deference because of its expertise in achieving the goals of the Clean Water Act. However, to institute those measures Tsakopoulos would have to cooperate with the involved federal agencies. Although it appears that the cost of the restoration sought is significantly less than the $1,000,000 civil penalty which will be

held in abeyance should Tsakopoulos elect to do the restoration,[20] reducing the penalty in favor of restoration would be justified under the reasoning that Tsakopoulos's election to do the restoration bears upon the necessity of a civil penalty. Ciampitti II, 669 F. Supp. at 686-87. Should Tsakopoulos voluntarily elect to cooperate with these agencies, that would indicate his good intention to improve the damage that he allowed his agents to cause to jurisdictional features of the United States. As observed by the Court in United States v. Ciampitti, 615 F. Supp. 116, 125 (D.N.J. 1984), Tsakopoulos's "good faith in preparing and implementing a restoration plan is a relevant factor in assessing the size or necessity of civil penalties."

Accordingly, if Tsakopoulos makes the election to have $1,000,000 of the imposed civil penalty held in abeyance pending determination of whether he has made such restoration, he shall cooperate with the EPA and the Corps in arranging for the preparation of a restoration plan covering at least four acres in and near Goose Creek, Dry Creek, and/or on other appropriate areas on property owned by Tsakopoulos ("the applicable land").[21] Four acres is approximately twice the acreage directly affected by his unlawful deep ripping activities. In light of the indirect impact that violations like those committed by Tsakopoulos have on jurisdictional waters downstream, the EPA's policy is to require restoration at a two-to-one ratio. See EPA's Trial Brief at 39. Tsakopoulos does not dispute that, if he had applied for a permit to deep rip the 30 jurisdictional

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[20] If Tsakopoulos does not elect to do the restoration this civil penalty could be used by the EPA to do restoration itself elsewhere.

[21] The EPA must agree to the site selected for restoration.

features, he would have been required to undertake restoration of an area determined by using this ratio. Therefore, mitigation on four acres of wetlands is appropriate. The restoration plan will be prepared by an independent environmental consulting firm selected by the EPA and will be subject to EPA approval. Tsakopoulos shall cooperate in the development of this restoration plan by (i) providing access to the applicable land, and (ii) reimbursing the environmental consultant selected by the EPA for the cost of developing the mitigation plan, and (iii) assisting the United States in implementing this plan.[13] To serve the goals of restoration, this activity may include fill removal, creation of buffers, installation of culverts to channel water flow, and revegetation.

III.

CONCLUSION

For the above-stated reasons, the Court finds that Angelo K. Tsakopoulos committed three hundred fifty-eight (358) violations of the Clean Water Act when he caused fill to be discharged into waters of the United States on parcels 6, 8, 9, and 10 of Borden Ranch. A civil penalty pursuant to 33 U.S.C. § 1319(d) is imposed in the amount of one million five hundred thousand dollars ($1,500,000). If Tsakopoulos files a notice that he elects to have held in abeyance his obligation to pay one million dollars ($1,000,000) of the civil penalty within thirty (30) days of the date this Order is filed, then the EPA shall file a proposed injunction which encompasses the relief described in its Trial Brief and section II.E., *supra*, within sixty

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[13] The restoration work should be performed by an independent firm selected by the EPA. Tsakopoulos shall cooperate in providing access to the applicable land and shall pay the costs for implementing the mitigation plan.

(60) days of the date this Order is filed; a Judgment would then be entered imposing a five hundred thousand dollar ($500,000) civil penalty and an injunction requiring restoration. If the restoration is not thereafter completed as Ordered, the EPA may file a motion seeking appropriate relief, which may include the re-imposition of all or part of that portion of the civil penalty which was held in abeyance. However, if Tsakopoulos does not timely elect to undertake the restoration, a Judgment will be entered imposing the full one million five hundred thousand dollar ($1,500,000) civil penalty.

IT IS SO ORDERED.

DATED: November 8, 1999

GARLAND E. BURRELL, JR.
UNITED STATES DISTRICT JUDGE

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United States District Court
for the
Eastern District of California
November 8, 1999

* * CERTIFICATE OF SERVICE * *

2:97-cv-00858

Borden Ranch

v.

USACE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on November 8, 1999, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

SF/GEB

Edmund L Regalia
Miller Starr and Regalia
1331 North California Boulevard
Fifth Floor
Walnut Creek, CA 94596

Edmund F Brennan
United States Attorney
501 I Street
Suite 10-100
Sacramento, CA 95814

Catherine M Flanagan
United States Department of Justice
Land and Natural Resources Division
PO Box 23986
Washington, DC 20026-3986

Jack L. Wagner, Clerk

BY: _____
Deputy Clerk